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ARTICLE

Court Provides Guidance on Class Counsel Fees and the Class Proceedings Fund Levy Calculation

On a re-hearing of the issue of class counsel fee determination, the Ontario Superior Court recently considered the appropriate approach for determining class counsel fees and the calculation of the Class Proceedings Fund (the Fund) levy in [*Welsh v. R.*](#)

The underlying litigation related to the previous Court approval of the parties' \$15 million settlement agreement in relation to sexual and physical assault claims for damages sustained by students at three provincial schools for the deaf. The Court at first instance, however reluctantly, approved what was viewed as a "poor" settlement, representing a fraction of the claimed \$325 million damages sought in the pleadings and where about 90% of the class members received no compensation. The approval of class counsel fees of \$3.75 million by the Court at first instance was then made conditional on a donation of \$1.5 million to a charity for the deaf, lessening the fees paid to counsel. On appeal, the donation order was found to be improper and the Court redirected the assessment of the legal fees on a *de-novo* hearing before a different judge. ([Read BLG's commentary on that previous decision here](#)).

On the new hearing, the Court held that the two most important factors in deciding whether legal fees requested are fair and reasonable are risk incurred and results achieved. In assessing risks incurred, the Court did not favour the type of approach that invites a case-by-case analysis of class counsel fees requested but rather an approach that mirrors the realities of the contingency fee litigation, where risks are assessed over a portfolio of files. In relying on what the Court termed a "more transparent and more principled approach" to not presumptively question agreed-fee amounts in cases where the judgment or settlement is under \$50 million, as in this case, the Court approved the agreed upon legal fees. As well, in assessing the results achieved, the Court lauded the results as "impressive" particularly given the challenges in advancing student institutional abuse claims. All in all, the Court found that the agreed upon legal fees were fair and reasonable.

The Court also provided helpful direction on the calculation of the statutory levy imposed in cases where the plaintiffs have received assistance from the Class Proceedings Fund. The Legislature of Ontario created the Fund to assist prospective class representatives in appropriate cases, by funding disbursements, and protecting them from adverse costs awards. When the Fund has provided such assistance, any award or settlement in the class action will first be applied to reimburse the Fund for the financial assistance given, and then be subject to a levy equal to 10 percent of the award or settlement, pursuant to s. 59.1 of the [Law Society Act](#), and the [applicable regulations](#). In this case, the Fund and the parties disagreed on whether the levy ought to be based upon the total amount that was available to class members under the settlement terms (\$10.2 million), or only upon the portion of that amount that class members actually claimed (\$7.5 million). The difference in calculation yielded a delta of \$250,000. In reviewing the language of the settlement agreement, the Court held that the agreement that had received previous Court approval specifically provided for the appropriate order for calculating the payment of the levy *before* class member compensation and *before* the actual take-up amount determination. The Court reasoned that the order specified in the agreement reflected the appropriate interpretation of the legislative language. In the Court's view, the proposed interpretation of the levy calculation after the take up determination would have a negative impact upon the viability of the Fund. That said, the Court concluded that an amendment was required to clarify the appropriate calculation of the levy.


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